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NO. 59211-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SANDRA LAKE,

Appellant,

v.

WOODCREEK HOMEOWNERS ASSOCIATION, a Washington homeowners association; GLEN R. CLAUSING, a single man,

Respondents.

BRIEF OF RESPONDENT WOODCREEK HOMEOWNERS ASSOCIATION

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2. Under circumstances in which the source documents for Woodcreek allow construction of a bonus room following application and approval, did the trial court properly grant summary judgment to defendants on plaintiff's challenge to the propriety of defendant Clausing's bonus room?

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court properly exercise its discretion when it allowed permitted the amendment?

COUNTER-STATEMENT OF THE CASE

This appeal arises out of the summary judgment and dismissal of plaintiff's claims against the Woodcreek Homeowners Association and Glen Clausing. Plaintiff and Mr. Clausing are homeowners of adjacent units, separated by a greenbelt, at Woodcreek. Plaintiff has challenged the propriety of the approval and construction of a bonus room over the garage of Mr. Clausing's unit.

1. The Undisputed Facts in this Case.

Per its original Declaration, Woodcreek was created in 1972 under the Horizontal Property Regimes Act, RCW 64.32. (CP 218-266) It consists of 150 townhouses built on approximately 23 acres of land and built in 3 phases. Some units are one story, and some are two stories, but all have an attached two car garage. (CP 221-22; 342-43; 385-86) In each phase, there were floor plans that included an optional "bonus room." (CP 221-22; 342-43; 385-86). The optional bonus room was typically available to only certain floor plans within each phase; however, in phase 3, where plaintiff and Mr. Clausing's units are located, the bonus rooms were available to all floor plans. (CP 395; 376).

In May of 2004 Mr. Clausing applied to the Woodcreek Homeowners Association Board for permission to construct the optional bonus room over the garage of his unit, Unit 109, (CP 159-60), and the Woodcreek Board approved that request. (CP 161) The Board considered and approved Mr. Clausing's request to add the bonus room just as it had considered and approved bonus rooms on several other occasions, starting as early as 1978. (*See, e.g.,* CP 182-83; 179; 144; 139) In June of 2006, at the Woodcreek Homeowners Association's Annual Meeting, the homeowners ratified and approved all prior actions of the Board in approving owner-constructed bonus rooms by an affirmative vote of 95.79% of votes cast (91/95) and 60.67% of all possible votes (91/150). (CP 137).

2. <u>Procedural History of this Case.</u>

On December 5, 2005 plaintiff filed suit against the Woodcreek Homeowners Association and Mr. Clausing. (CP 1-10). On December 23, 2006 attorney Kris Sundberg appeared on behalf of Woodcreek Homeowners Association. (CP 11-12). On May 4, 2006 Mr. Sundberg filed an Answer on behalf of Woodcreek, including a crossclaim against Mr. Clausing. (CP 13-23). On June 21, 2006 Mr. Clausing answered plaintiff's Complaint, including a counterclaim against plaintiff and a crossclaim against Woodcreek. (CP 24-31).

On May 31, 2006 Mr. Sundberg and attorney Marion Morgenstern filed a Notice of Withdrawal and Substitution of Counsel, which was apparently rejected by the clerk of the court for an erroneous cause number and refilled on June 21, 2006. (CP 32-33).

On September 13, 2006 plaintiff filed a motion for partial summary judgment against Woodcreek and Mr. Clausing and noted it for hearing on October 11, 2006. (CP 46-52).

On September 19, 2006 Ms. Morgenstern filed her Notice of Intent to Withdraw as counsel for Woodcreek. (CP 79-80). That Notice indicated trial was scheduled to commence on June 4, 2007, more than 8 months later. (CP 79).

On September 27, 2006 Ms. Morgenstern and counsel undersigned filed their Notice of Withdrawal and Substitution of Counsel for Woodcreek. (CP 86-87)

On October 8, 2006 Mr. Clausing filed his response to plaintiff's motion for partial summary judgment and cross-moved for summary judgment and dismissal. (CP 101-23). On October 25, 2006 Woodcreek joined in Mr. Clausing's motion for summary judgment and dismissal of plaintiff's claims and Complaint. (CP 664-5).

On November 1, 2006 Woodcreek filed a motion for leave to amend its Answer. (CP 617-37) Plaintiff opposed the motion for leave to

amend, (CP 638-49); however, on November 16, 2006, the trial court granted the motion, noting there was ample time to complete discovery before trial in June of 2007 and leave was being freely given in the absence of prejudice to the other parties, and imposing $1,000 in terms for the late motion to amend. (CP 720-22).

On November 22, 2006 the trial court heard oral argument on plaintiff's and defendants' cross-motions for summary judgment. (RP 1-11). At the outset of the hearing, the trial court had the following exchange with plaintiff's counsel regarding the hearing on the motions and the effect of Woodcreek's amended Answer:

> THE COURT: We're here on Lake and Clausing. Ms. Jones, would you like to go ahead?
>
> MS. JONES: Yes, Your Honor. I received your message yesterday regarding an Order regarding the motion to amend. And I'd like to know whether the Court is basically instructing me to refile my motion pending or to revise it. And so is that the Court's instruction to me –
>
> THE COURT: I wasn't sure about exactly what you wanted to do in light of the amendment. You can go ahead and argue the motion anyway, if you want, at this point. Obviously you no longer have what you viewed as an admission by Woodcreek in dealing with it. If we can go ahead and argue it based on the record you've got, or refile it if you want to do that.
>
> MS. JONES: Okay. I ask leave to refile. Here is my take on that. If the defendants' motion is denied, then the Court on its own motion could essentially grant the – my relief, anyway. If that's not going to happen, then I could refile

> my motion to include, you know, the proper argument and change that. So we may want to proceed that way, because a denial of their motion, you know, basically may do the same thing. Because – well, it depends.
>
> THE COURT: Right.
>
> MS. JONES: There's factual issues.
>
> THE COURT: It probably makes more sense for you to go ahead and go first, because I have a pretty good idea of the arguments on both sides at this point.

(RP 2-3) Of note, at no time did plaintiff's counsel indicate that she needed additional time, information or discovery in order to respond to the defendants' motion for summary judgment and dismissal.

The trial court granted summary judgment and dismissal in favor of the defendants on November 22, 2006. (CP 777-81) On November 27, 2006 plaintiff filed her Notice of Appeal. (CP 782-91). On February 7, 2006 plaintiff filed her Amended Notice of Appeal. (CP 995-1008) Plaintiff did not identify the trial court's Order on Woodcreek's motion to amend its Answer in either her Notice of Appeal or her Amended Notice of Appeal.

ARGUMENT

> It is well settled that we review the record on summary judgment *de novo*, engaging in the same inquiry as the trial court. *Benjamin v. Wash. State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). Because our review is de novo, we are free to premise our holding affirming summary judgment on an issue not decided by the trial court. *See*

> *Redding v. Va. Mason Med. Ctr.*, 75 Wn.App. 424, 426, 878 P.2d 483 (1994) (an appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record); *see also LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c).

International Broth. of Elec. Workers, Local Union No. 46 v. TRIG Elec. Const. Co., 142 Wn.2d 431, 435, 13 P.3d 622 (2000). Woodcreek Homeowners Association respectfully submits plaintiff's claims and Complaint as alleged against it were properly dismissed by the trial court at summary judgment and should be affirmed on appeal.

1. **The Construction of a Bonus Room does not Alter the Values or Percentages of Undivided Interest at Woodcreek.**

Plaintiff's arguments before the trial court and this Court, and indeed her entire case, turns on a single, fundamental error: that the addition of a bonus room at Woodcreek, with its associated square footage, alters the values and percentages of undivided interest such that unanimous consent of all owners is required before any such addition can be approved. This position in not supported by the Woodcreek source documents, the Horizontal Property Regimes Act, RCW 64.32, *et seq.*, the statutory authority under which Woodcreek was formed, of the Washington Condominium Act, RCW 64.34, *et seq.*, to the extent that Act

is applicable to Woodcreek. As it did before the trial court, Woodcreek joins in the arguments of Mr. Clausing as they relate to the propriety of the trial court's grant of summary judgment and dismissal of plaintiff's claims and Complaint in this case.

The 1972 Declaration

In 1972 the Declarant filed the original Condominium Declaration for Woodcreek Division No. 1. (CP 218-66) Section 8 of the Declaration established the value of the property and the value and undivided interest of the 50 units that were to comprise Division No. 1. (CP 228-9) Annex A to the Declaration set forth a particular description for each unit in Division No. 1. (CP 243-60) An analysis of several units in Division 1 reveals the Declarant did not use square footage to determine either value or undivided interest, the ratio of the unit value to the total value, given that the price per square foot varies both with unit square footage and lot square footage.

Unit & Value	**Unit Sq. Ft.**	**$/Sq. Ft.**	**Lot Sq. Ft.**	**$/Sq. Ft**
1: $29,500	1726	$17.09	2656	$11.11
2: $36,500	2142	$17.04	2572	$14.19
3: $39,500	2609	$15.14	2572	$15.36
10: $34,500	1940	$17.78	2769	$12.46
11: $34,900	1940	$17.99	2769	$12.60
12: $39,500	2609	$15.14	2572	$15.36

In Annex B to the original Declaration, the Declarant also set forth the value of the property, the value of each unit and the percentage of undivided interest for Woodcreek upon the addition of Phase # 2 and Phase # 3. (CP 261-6)

Section 3 of the Declaration, (CP 221-2), set forth the four unit plans (and their reverse) for Division No. 1 and indicated there were four alternate floor plans for a bonus room that could be added to two of the unit plans "[u]pon the option of the purchaser..." (CP 222) "The second floor plans for the Type C and D Units will include an additional area to be situated directly above the two car garage which is incorporated within the basic structure of the apartment unit." (CP 222) Nowhere in the Declaration is there any indication that the addition of a bonus room as a purchaser option would alter the value of the property, the value of a unit, or the undivided percentage of ownership. Indeed, RCW 64.32.050 mandates, "The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall not be altered except in accordance with the procedures set forth in the bylaws and by amending the declaration."

Section 12 of the Woodcreek Declaration, (CP 232-3), sets forth the procedures for subdividing and/or combining "any apartment unit or units or [ ] the common areas or facilities or limited common areas or facilities." (CP

232) Specifically, section 12 requires an "affirmative vote of 51% of the voting power of the owners of the apartment units." (CP 232) Of significant note, section 12 sets forth how the subdivision of an apartment unit shall affect the percentage of undivided ownership; however, section 12 does not dictate any effect on the percentage of undivided ownership resulting from a combination of a unit or units with common or limited common areas and facilities.

Section 19 of the Declaration, (CP 240), provided that the declaration could be amended upon 60% written consent of the apartment owners. Section 19 also provided, and this is the language upon which plaintiff hangs her hat, that "an amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous written consent of all apartment owners..." (CP 240) The only amendments to the Woodcreek Declaration that have involved the value of the property, the value of the units and the undivided percentage of ownership are those that were made by the Declarant.

The 1973 Amendment to the Declaration

In 1973 the Woodcreek Declaration was amended, (CP 275-324), with changes being made to the value of the property, the value of each unit and the percentage of undivided interest, (CP 285-6); however, sections 3,

(CP 278-9), 12, (CP 289-90) and 19, (CP 298) were unchanged. Annex B to the Amended Declaration again sets forth what effect the addition of phases # 2 and # 3 will have on Woodcreek, if added. (CP 319-24) An analysis of the changes affected by this amendment reveal the Declarant was still not using square footage as the basis for determining value in Division No. 1.

Unit & Value	Unit Sq. Ft.	$/Sq. Ft.	Lot Sq. Ft.	$/Sq. Ft
1: $39,000	1726	$22.60	2656	$14.68
2: $49,000	2142	$22.88	2572	$19.05
3: $54,500	2609	$20.89	2572	$21.19
10: $42,500	1940	$21.91	2769	$15.35
11: $42,500	1940	$21.91	2769	$15.35
12: $54,500	2609	$20.89	2572	$21.19

The 1974 Amendment to the Declaration (Adding Phase # 2)

In 1974 the Woodcreek Declaration was again amended; this time to incorporate Division No. 2 (Phase # 2). (CP 341-63) Sections 3 and 4 of the 1974 amendment provided for the addition of 11 buildings, consisting of 50 units, and 3 unit types (and reverse). (CP 342-3) Two of the unit types had an optional bonus room that would be "situated directly above the two car garage, which is incorporated within the basic structure of the apartment unit. (CP 343) Sections 12 and 19 of the 1972 Declaration, as amended, were not changed.

Annex A to the 1974 amendment established the description of the units in Division No. 2, (CP 347-59), and Annex B to the 1974 amendment established the value of the property, the value of the individual units, and the percentage of undivided interest. (CP 360-3) The values of the units in Division No. 1 were unchanged by the 1974 amendment; however, their respective percentages of undivided interest proportionately declined. In contrast to the 1972 Declaration and the 1973 amendment, the 1974 amendment, in Annex B, declined to provide the units values and percentages of undivided interest for any potential Division No. 3. Instead, it established the declared value of the property, should Division No. 3 be added, and confirmed that the percentage of undivided interest of units in Division No. 1 and No. 2 would be established by the ratio of the individual unit value to the total property value. (CP 362-3) Again, there is no correlation between square footage and value.

Unit & Value	Unit Sq. Ft.	$/Sq. Ft.	Lot Sq. Ft.	$/Sq. Ft
1: $39,000	1726	$22.60	2656	$14.68
2: $49,000	2142	$22.88	2572	$19.05
3: $54,500	2609	$20.89	2572	$21.19
10: $42,500	1940	$21.91	2769	$15.35
11: $42,500	1940	$21.91	2769	$15.35
12: $54,500	2609	$20.89	2572	$21.19
60: $42,900	1781	$24.09	2972	$14.43

Unit & Value	Unit Sq. Ft.	$/Sq. Ft.	Lot Sq. Ft.	$/Sq. Ft
61: $49,900	2441	$20.44	2972	$16.79
62: $47,900	2057	$23.29	3310	$14.47
85: $49,900	2441	$20.44	2972	$16.79
86: $47,900	2057	$23.29	3310	$14.47

The 1976 Amendment to the Declaration (Adding Phase # 3)

The Woodcreek Declaration was amended again in 1976 to add the last 50 units, spread over 12 buildings, and consisting of 4 unit types (and their reverse). (CP 383-93) Section 4 of the 1976 amendment specified that 2 of the 4 unit types could incorporate a bonus room at the option of the purchaser. (CP 385-6) Both plaintiff and defendant Clausing have units located in Division No. 3, such that their declared values and percentages of undivided ownership are as set forth therein. The 1976 amendment did not affect the provisions of the Declaration dealing with the procedures for amending the declaration or subdividing and/or combining units and/or common or limited common areas. The 1976 amendment carried forward the values of the units from Division No. 1 and No. 2 such that there could still be no correlation between the declared value of the individual units and the square footage of either the units or the lots upon which they sat. The Annex to the 1976 Amendment to the Declaration also set forth the declared value of the total property, the declared value of each unit, and the percentage of undivided ownership of each unit. (CP 391-3)

The 1977 Amendment to the Declaration

When Division No. 3 was added to Woodcreek by the 1976 Amendment to the Declaration, only 2 of the 4 units types, Type L and Type M, were designated as having the option of a bonus room. (CP 385-6) In 1977 Woodcreek filed a Certificate of Amendment that designated all 4 unit types in Division 3 as potentially having a bonus room, and confirmed that bonus rooms had been constructed as part of all 4 types:

> In addition on Page 5 of 5 of the Survey Map and Plans there is designated in the plans for Type J, K, L and M units, a room designated as the Bonus Room. The following Units have been constructed with Bonus Rooms, which consists of 416 additional square feet:
>
> 130M
> 131M
> 137K
> 139J
> 146L
> 149M

(CP 395) The 1977 Amended Survey Map and Plans further sets forth that bonus rooms were also constructed in a number of other units of all 4 unit types. (CP 372-6) Significantly, the identification of bonus rooms in all 4 unit types did not alter the value of the property, the value of the individual units or the percentage of undivided ownership of those units as set forth the Declaration as last amended in 1976. Further, there has been no amendment

to the Declaration since 1976 that alters the value of the property, the value of the individual units or the percentage of undivided ownership.

A comparison of the percentage ownership of just the 6 units identified in the 1977 to other similar units in Division No. 3, including plaintiff's unit, establishes that there is no correlation between the presence or absence of a bonus room and the value and percentage of undivided interest among the same unit types.

Unit	Type	Bonus Room	Value	% Interest
107	J	N	$41,289	.584
135	J	N	$44,189	.626
139	J	Y	$41,289	.584
112	K	N	$46,364	.656
132	K	N	$46,364	.656
137	K	Y	$46,364	.656
102	L	N	$49,989	.708
108 (Lake)	L	Y	$56,786	.801
121	L	N	$51,076	.723
146	L	Y	$49,989	.708
129	M	N	$51,076	.723
130	M	Y	$41,289	.584
131	M	Y	$44,189	.626
133	M	N	$42,376	.600
144	M	N	$45,276	.641
149	M	Y	$44,189	.626

The Woodcreek source documents demonstrate the declared values and resultant percentages of undivided ownership by each unit owner are not a function of either square footage or the presence or absence of a bonus room. The Woodcreek source documents further establish that all 4 unit types in Division No. 3 were permitted to have bonus rooms constructed over the two-car garage, and that bonus rooms were constructed over all 4 unit types during the original construction by the developer/declarant. Consequently, there is nothing in the source documents that would preclude defendant Clausing's unit from having a bonus room. Further, Section 12 of the Declaration specifically allows combining of units and/or common areas and/or limited common areas upon an affirmative vote of 51% of the voting power of the owners. Section 19, with its unanimous consent language, is not even applicable unless the homeowners are trying to change the values and percentages of undivided interest, which was never attempted in this case.

Plaintiff's reliance on *Bogomolov v. Lake Villas Condominium Association*, 131 Wn.App. 353, 127 P.3d 762 (2006) and *Keller v. Sixty-01 Assoc. of Apt. Owners*, 127 Wn.App. 614, 112 P.3d 544 (2005) is misplaced. The decision in *Bogomolov* is premised on fundamentally different source documents, and the decision in *Keller* does not stand for the proposition asserted by plaintiff.

In *Bogomolov*, the source documents for Lake Villas Condominium contain language that is fundamentally at odds with the language of the source documents for Woodcreek. (CP 729-50) The Lake Villas declaration contained a specific formula for establishing the percentage of undivided interest of each unit, tied that formula to the assignment of boat slips, and required unanimous consent of all owners before there could be any subdividing or combining.

Section 7 of the Lake Villas Declaration sets forth the formula for calculating the percentage of any apartment and the effect of having parking spaces and/or dock spaces assigned:

> The value and percentages allocated to open parking spaces and dock spaces are allocated solely for purposes of facilitating the assignment or transfer of the exclusive use thereof or among apartments as limited common areas. The open parking spaces and dock spaces are not apartments and they or the easement or right to their exclusive use and their related percentage of interest will be appurtenant to the apartment to which they are assigned as limited common area and/or for the exclusive use of such apartment. *The total percentage of any apartment will be the combined percentages of the apartment and the open parking spaces and dock spaces assigned to it, if any.* [Emphasis added.]

(CP 734)

Schedule A of the Lake Villas Declaration set forth the value of each unit and its percentage of undivided interest. (CP 749-50) It also set forth the total value and percentage for open parking spaces and dock spaces. Specifically, Schedule A provided that each open parking space had a value of $1,500 and percentage of .04. Schedule A also provided that certain dock spaces had an individual value of $1,350 and associated percentage of .035, while certain other dock spaces had an individual value of $2,000 and associated percentage of .06. (CP 750) So, for example, Lake Villas unit J6 had a declared value of $63,900 and an associated percentage of 1.76. If unit J6 also had an assigned open parking space and dock space number 19, then its total percentage would be 1.86 (1.76 + .04 +.06).

Where an apartment at Woodcreek has the value and percentage assigned to it in the Declaration and amendments, which value and percentage are not dependent upon either square footage or the presence of a bonus room, the value and percentage of an apartment at Lake Villas is inextricably tied the value and percentage assigned in that Declaration *plus* the value and percentage assigned by the Declaration to any open parking space and/or dock space that may be assigned to the apartment. Adding or subtracting a dock space from an apartment at Lake Villas necessarily altered the value and percentage assigned to that apartment.

Lake Villas expressly considered the effect of having assigned dock spaces transferred from one apartment owner to another in section 6.d. of the Declaration:

> Individual apartment owners may reassign the exclusive use of dock spaces to other apartments in this condominium by recorded deed, *in which case the value and percentage of the apartment gaining a dock space will be increased, and that of the apartment losing a dock space will be reduced, pursuant to the values and percentages in Schedule A,* but in no event may and [sic] dock space or its exclusive use be so assigned to persons not residents in this condominium. [Emphasis added.]

(CP 733) Woodcreek has no such requirement in its Declaration.

Finally, and perhaps most importantly, the Lake Villas' Declaration required that any act of subdividing or combining required unanimous consent, not the 51% required in the Woodcreek Declaration and secured vis-à-vis the owners' ratification of all bonus rooms approved by the Woodcreek Board. Section 27 of the Lake Villas' Declaration provided:

> Subdividing and/or combining of any apartment or apartments, common areas and facilities, or limited common areas and facilities *are authorized only as follows: Any owner or any apartment or apartments may propose any subdividing and or [sic] combining of an apartment, apartments, or common areas or limited common areas in writing, together with completed plans and specifications for accomplishing the same and*

> *a proposed amendment to the Declaration, Survey Map and Plans covering such subdividing or combining, to all other apartment owners. Upon written approval of such proposal and signature of the amendment to the Declaration by all owners, the owner making the proposal may proceed according to such plans and specification;* provided ... [Emphasis added.]

(CP 746) Thus, when Lake Villas considered having new dock spaces constructed and assigned to individual units, it was required to have unanimous consent of all of the owners as the common area was being subdivided and combined with the apartment to which exclusive use of the dock spaces were to be assigned. Subdividing and combining at Woodcreek required only 51% approval, which defendant Clausing's bonus room has received via ratification of the Board's action. As such, the decision in *Bogomolov* is neither controlling, nor persuasive, as the Woodcreek Declaration, and its amendments, are fundamentally different from those upon which the *Bogomolov* decision rested.

In *Keller v. Sixty-01 Associates* a grant of summary judgment in favor of the owners association was reversed on the basis of factual issues surrounding an amendment affecting the manner in which expenses were allocated. Consistent with the Horizontal Property Regimes Act and its Declaration, Sixty-01 allocated common expenses on the basis of percentage of undivided interest from 1978 to 1992. *Keller*, 127 Wn.App. at 618-9. In

1992 Sixty-01 adopted an amendment to its declaration that altered the original allocation scheme, uncoupling the assessments from the percentages of undivided interest. *Id.*, 127 Wn.App. at 619-20. This amendment received at least 60% support from the owners.

In 1999 the Board of Sixty-01 became concerned that the 1992 amendment should have been approved by 100% of the owners, and invalidated the amendment. *Id.* The plaintiffs, whose share of the common expenses was reduced by the 1992 amendment, sued to challenge the Board's revocation of the amendment. *Id.*, 127 Wn.App. at 620.

The Court of Appeals concluded Sixty-01 had to adopt an amendment to its Declaration in order to uncouple its allocation of the common expenses from the percentages of undivided interest; however, the Court also concluded that such an amendment did not alter the values or percentage of undivided interest and required only 60% approval from the owners. *Id.*, 127 Wn.App. at 622-5.

Contrary to plaintiff's argument, *Keller* stands for the proposition that any increase the Woodcreek Board may have made to Mr. Clausing's common expense allocation as a result of his bonus room may be ineffective as the Woodcreek Declaration has not been amended. *Keller* does not stand for, and rejected the argument, that were the allocation of common expenses changed, that would necessarily reflect a change in the values and

percentages of undivided interest such that unanimous consent of the owners would be required.

Woodcreek joins in Mr. Clausing's responses to plaintiff's arguments that Mr. Clausing is not a "purchaser" under the terms of the Woodcreek Declaration and that there are restrictive covenants somewhere in the Woodcreek Declaration that preclude the addition of the bonus room set forth in the Declaration any time after the initial sale of a unit.

Woodcreek respectfully submits its source documents allow for the construction of optional bonus rooms such as the one constructed by Mr. Clausing in this case.

2. Defendant Clausing Applied for and Received Approval for Construction of his Bonus Room.

Given the Woodcreek source documents allow for construction of an optional bonus room, the only issue is whether Mr. Clausing's bonus room was properly authorized.

In *McLendon v. Snowblaze Rec. Club Owners Assoc.*, 84 Wn.App. 629, 929 P.2d 1140 (1997), the Court of Appeals, Division III, considered the propriety of a Board executing a lease to allow a unit owner to convert a storage shed into a bedroom for her unit. The condominium at issue, like Woodcreek, was created under the Horizontal Property Regimes Act, RCW 64.32, *et seq.* The *McLendon* court found that RCW 64.32.050(3), which

provides that common areas shall remain undivided, and RCW 64.32.090(10), which provides that the declaration must contain a provision authorizing and establishing the procedures for subdividing and/or combining, can be easily reconciled. *McLendon*, 84 Wn.App. at 633. The Snowblaze Declaration expressly provided that subdivision and/or combining could be accomplished by a 60% vote of the owners. *Id.*, at 632. As noted above, the *McLendon* court found the action of the Board in approving the lease to be valid following ratification by more than 60% of the owners. *Id.*

In contrast, the Woodcreek declaration requires only a 51% affirmative vote of the owners of Woodcreek in order for subdividing and/or combining to occur. (CP 232). In accordance with the Woodcreek Bylaws, defendant Clausing sought and secured Board approval prior to constructing his bonus room. (CP 131) Given the authority of the By-Laws adopted by the owners, the Board arguably has authority to approve the bonus room on its own. If, however, the owners were to have been polled regarding Mr. Clausing's bonus room, the Board's action was subsequently ratified in June of 2006 when more than 51% of voting power at Woodcreek approved the actions of the Board in approving owner constructed bonus rooms.

The Woodcreek Homeowners Association has not amended its declaration to change the value of the property, the value of the individual

units *and* the percentage of undivided ownership since 1976. Accordingly, there has been no need to secure the unanimous written consent of the owners for any such amendment. The declared value of Woodcreek; the declared values of the units owned by plaintiff, defendant Clausing, and all of the other Woodcreek owners; and the percentage of undivided interest of plaintiff, defendant Clausing and all of the other owners at Woodcreek have remained unchanged since that time.

Woodcreek respectfully submits the Woodcreek source documents allow for the construction of a bonus room and Mr. Clausing properly applied for and received authorization for construction of his bonus room. The summary judgment and dismissal entered by the trial court should be affirmed.

3. Plaintiff Elected to Proceed with the Hearing on Defendants' Motion for Summary Judgment.

On appeal, for the first time, plaintiff argues she should have been afforded the opportunity to conduct discovery prior to summary judgment given Woodcreek's amended Answer. "[G]enerally, a contention by an opposing party that he was not given sufficient time to present matter in opposition cannot be successfully made for the first time on appeal." *Turner v. Kohler*, 54 Wn.App. 688, 694, 775 P.2d 474 (1989) *quoting* 6 J. Moore, *Federal Practice* at 56-820 to 56-821 (2d ed. 1988). Plaintiff's

argument also ignores the posture of the case at the time the trial court heard the cross-motions on summary judgment.

The amendment of Woodcreek's Answer may have undermined the factual basis and arguments in plaintiff's motion for partial summary judgment; however, it had no effect on Mr. Clausing's motion for summary judgment and dismissal in which Woodcreek had joined even before it had been given leave to amend its Answer. The evidence and arguments that support the trial court's grant of summary judgment and dismissal are wholly independent of Woodcreek's original Answer. Further, regardless of whether Woodcreek had been given leave to amend its Answer, plaintiff had to respond to the evidence and arguments marshaled by Mr. Clausing in support of his motion for summary judgment and dismissal.

Had plaintiff actually needed additional time to conduct discovery before the hearing on defendants' motion for summary judgment, she could have sought relief under CR 56(f). That rule provides a party with an opportunity to delay a motion for summary judgment if she cannot present evidence necessary to establish her opposition. It is not enough, however, to simply request more time, the party must also demonstrate a good reason for delay in obtaining evidence, what evidence would likely be established by additional discovery, and that the evidence would raise a

genuine issue of material fact. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn.App. 899, 903, 973 P.2d 1103 (1999) *quoting Coggle v Snow*, 56 Wn.App. 499, 507, 784 P.2d 554 (1990).

Plaintiff made no request to the trial court for relief under CR 56(f). Further, even before this Court, plaintiff is arguing she should have been able to conduct discovery related to the circumstances surrounding the filing of the original Answer by Woodcreek. Plaintiff made no argument to the trial court, nor does she to this Court, that any discovery surrounding the amendment of Woodcreek's Answer could have created a material issue of fact on defendants' motion for summary judgment.

It is clear from plaintiff's counsel's exchange with the trial court during the hearing on November 22, 2006, that she did not believe she needed more time or discovery to *respond* to the defendants' motion; rather, she seemed to take for granted the defendants' motion would be denied, focusing instead on whether plaintiff's motion would be granted *sua sponte* or would need to be reworked to "include, you know, the proper argument and change that." (RP 2-3) Even in discussing reworking her motion, plaintiff mentions the argument, not the factual record that would be needed for summary judgment in favor of plaintiff. Plaintiff never suggested she needed additional time to oppose defendants' affirmative motion for summary judgment and dismissal.

Plaintiff failed to request relief from the trial court pursuant to CR 56(f) before or at the hearing on the cross-motions for summary judgment. Even now, on appeal, plaintiff fails to suggest how any discovery regarding Woodcreek's amended Answer could have raised a material issue of fact at summary judgment. Moreover, plaintiff ignores the fact the defendants' motion for summary judgment and dismissal stood on its own factual and legal merits. The trial court did not abuse its discretion when it proceeded to hear the cross-motions for summary judgment under circumstances in which plaintiff made no affirmative request for more time to respond and elected to proceed with the hearing as scheduled.

4. Leave to Amend Pleadings should be Freely Given when Justice so Requires.

The trial court's Order granting Woodcreek leave to amend its Answer establishes the court was aware of the proper standard for evaluating a request for leave to amend a pleading and affirmatively exercised its discretion in weighing the potential prejudice to the other parties and imposing terms for the later amendment to the pleadings. (CP 720-22) The trial court's exercise of discretion cannot be overturned by this Court unless the trial court abused its discretion.

> The amendment of pleadings is addressed to the sound discretion of the trial court, whose determination will be overturned on review only for abuse of such discretion. *Lincoln v.*

> *Transamerica Inv. Corp.*, 89 Wn.2d 571, 573 P.2d 1316 (1978). An abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26; 482 P.2d 775 (1971).

Walla v. Johnson, 50 Wn.App. 879, 882, 751 P.2d 334 (1988). The trial court's discretion was grounded in CR 15(a), which provides that where, as here, more than 20 days had elapsed since Woodcreek's Answer was filed and there was no written consent of other parties, "a party may amend his pleadings only by leave of the court ...; and leave shall be freely given when justice so requires."

In *Walla v. Johnson, supra*, the Court of Appeals held that the trial court abused its discretion in denying the defendant's motion for leave to amend the answer under facts that are similar to those in this case. *Id.*, 50 Wn.App. at 885. Defendant Woodcreek submits the analysis of the *Walla* court is equally applicable to this case.

In *Walla v. Johnson*, the plaintiff filed suit in September of 1984, and the defendant appeared on October of 1984. Approximately 5 months later, in March of 1985, the defendant filed his Answer. In this case, counsel for Woodcreek filed the Answer Woodcreek sought to amend approximately 5 months after Woodcreek appeared.

In *Walla* counsel for the defendant withdrew approximately 5 months after the Answer was filed. In this case defendant Woodcreek had two counsel withdraw and had counsel undersigned appear within approximately 4 months of the original Answer having been filed. In *Walla* the defendant sought leave to amend his Answer in October of 1986, some two years after it appeared, some 14 months after it substituted counsel and just 3 months before trial. In this case, defendant Woodcreek sought to amend its Answer approximately 6 months after it was filed, a little over 1 month after counsel undersigned substituted as counsel for Woodcreek, and 7 months before trial.

One distinction between the present case and *Walla* is that plaintiff had a pending motion for summary judgment based upon the Answer Woodcreek was seeking to amend. However, that issue was decided in favor of the party seeking leave to amend in *Tagliani v. Colwell*, 10 Wn.App. 227, 517 P.2d 207 (1973), which was quoted and relied upon by the court in *Walla v. Johnson*. In *Tagliani*, the plaintiff sought to amend the complaint to add additional causes of action after the defendant's motion for summary judgment had been argued, and the trial court had ruled orally on the motion, but before the trial court had entered its written order on the motion for summary judgment. In reversing the trial court's denial of leave to amend,

the *Tagliani* court quoted the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962):

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded.... If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, ... the leave sought should, as the rules require, be "freely given."
>
> *Tagliani v. Colwell, supra* 10 Wn.App. at 233, 517 P.2d 207.

Walla, 50 Wn.App. at 883.

In this case, plaintiff's motion for summary judgment had not yet been considered by the trial court, and the basis for plaintiff's motion was essentially argument premised upon the Answer originally filed by defendant Woodcreek. There was no bad faith or dilatory motive on behalf of defendant Woodcreek. And while there was some delay, there was no undue delay, and there was little or no prejudice to plaintiff.

> Although undue delay is a legitimate ground for denying leave to amend the pleadings, such delay must be accompanied by prejudice to the nonmoving party. *Appliance Buyers Credit Corp. v. Upton,* 65 Wn.2d 793, 399 P.2d 587 (1965).

Walla, 50 Wn.App. at 883.

In *Elliott v. Barnes*, 32 Wn.App. 88, 92, 645 P.2d 1136 (1982), the Court of Appeals found no abuse of discretion on the basis of undue delay when the trial court denied plaintiff leave to amend a complaint a year after it was filed but less than 1 week before trial. However, the plaintiff in *Caruso v. Local 690*, 100 Wn.2d 343, 670 P.2d 240 (1983), was allowed to amend a complaint to add a cause of action more than 5 years after the original complaint was filed.

The court in *Walla v. Johnson*, analyzed *Caruso* as follows:

> The *Caruso* court held that delay in and of itself is insufficient to deny leave to amend:
>
> > The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.
>
> *Caruso,* at 350, 670 P.2d 240.
>
> The *Caruso* court noted that the nonmoving party filed an affidavit that it would suffer undue prejudice because of lack of prior knowledge, making it difficult to prepare a defense, but the affidavit set forth no specific objections relating to actual prejudice. The *Caruso* court held that this was an insufficient showing to find that the trial court abused its discretion. *Caruso,* at 351, 670 P.2d 240.

Walla, 50 Wn.App. at 884.

The *Walla* court then concluded that a motion to amend an answer that was brought 3 months before trial allowed sufficient time to conduct discovery and prepare for trial. *Id.*, 50 Wn.App. at 884. The *Walla* court also opined it was within the trial court discretion to continue the trial were it concerned about the time necessary to prepare for trial. *Id.*, 50 Wn.App. at 885 *citing Quackenbush v. State*, 72 Wn.2d 670, 434 P.2d 736 (1976).

Defendant Woodcreek Homeowners Association respectfully submits that had it not been permitted to amend its Answer, then its ability to defend itself and have the trial court evaluate the merits of the plaintiff's claims and Woodcreek's defenses would have all but been lost. There had been little done in the way of discovery at the time the trial court granted Woodcreek leave to file its amended Answer, and there was ample time to conduct discovery had it been necessary for all parties to be prepared for a trial that was still 7 months away.

> Although the grant or denial of an opportunity to amend is within the discretion of the trial court, "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman,* 371 U.S. at 182, 83 S.Ct. at 230. *See also Appliance Buyers Credit Corp. v. Upton, supra.*

Walla v. Johnson, 50 Wn.App. at 885.

Plaintiff does not dispute that leave to amend "shall be freely given when justice so requires." Further, cites no case for the proposition that Woodcreek's retraction of admissions made in the original Answer was improper, particularly given Mr. Clausing's contrary pleadings, and the ample time to conduct discovery, if needed to address the amendments. Further, the case plaintiff has cited were decided on the basis of prejudice to the non-moving parties as an exercise of the trial court's discretion in those cases. In *Eaton v. General Compressed Air & Vacuum Machinery Co.*, 62 Wn. 373, 375, 113 P. 1091 (1911), the trial court apparently denied leave to amend given the untimely nature of the request, coming after a jury had already been impaneled. In *Del Guzzi Constr. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986), the trial court denied leave to amend "on the basis that the amendment would unduly prejudice the non-moving parties." The facts in that case suggest the matter had been pending for approximately 3 ½ years and the motion to amend came little more than 1 week before summary judgment.

The reasoning of the *Del Guzzi* court is also instructive in this case:

> The purpose of pleadings is to " facilitate a proper decision on the merits" , *Conley v. Gibson,* 355 U.S. 41, 48, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957), and not to erect formal and burdensome impediments to the litigation process. Rule 15 of the Federal Rules of Civil Procedure, from which CR 15 was

> taken, " was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *United States v. Hougham,* 364 U.S. 310, 316, 5 L.Ed.2d 8, 81 S.Ct. 13 (1960). CR 15 was designed to facilitate the same ends.
>
> * * * * *
>
> Because the trial judge based his decision upon the " touchstone for denial of an amendment" , *i.e.* prejudice, the trial court's denial was not a manifest abuse of discretion or a failure to exercise discretion, and therefore should not be disturbed on appeal.

Del Guzzi, 105 Wn.App. at 888-89. The same should hold true if the trial court bases its decision on the touchstone for denial, *i.e.,* prejudice, but concludes, as an exercise of discretion, leave to amend should be granted.

Defendant Woodcreek agrees the Court should consider prejudice to the opposing party when evaluating a motion for leave to amend; however, there was little to no prejudice to plaintiff in this case, as allowing the requested amendments did no more than require that plaintiff prove her case – the same obligation plaintiff had at the inception of this case. To the extent plaintiff believes additional discovery may have been required, it was discovery that plaintiff must have anticipated upon filing suit but felt she did not need to do following discussions with Woodcreek's original counsel and after receiving Woodcreek's original Answer. If the plaintiff believed

additional time will be necessary to complete discovery, then it is within the trial court's discretion to allow additional time, but plaintiff never requested additional time.

A review of the operative allegations in the Complaint and the answers thereto in original Answer reveals disputed legal issues, not factual issues. Plaintiff's *legal* position is that the Woodcreek Board did not have authority to grant defendant Clausing permission to add his bonus room. The facts of this case are that the Board believed it did have authority to grant defendant Clausing permission to add the bonus room, as it had done multiple times in the past with other owners.

The original Answer filed on behalf of defendant Woodcreek conceded legal issues, not factual issues. For example, in paragraph 4.4 of the Complaint plaintiff alleged the Board action was unreasonable and arbitrary. (CP 7) The Answer did not strictly respond; rather, paragraph 27 admitted that action other than mere Board approval was required. (CP 18) Similarly, in paragraph 4.6, plaintiff alleged the defendant had an obligation to obtain unanimous consent of all owners, (CP 7), and the original Answer at paragraph 29 admitted action other than mere Board approval was required. (CP 18)

The trial court properly recognized that Woodcreek should be allowed to have its day in court and to have its factual positions tested by the

trial court for legality. The Board believed it had authority to act when it approved defendant Clausing's bonus room, and it properly should have been allowed to have the trial court evaluate the propriety of its actions, notwithstanding the legal admissions contained in its original Answer. Moreover, plaintiff's claims against defendant Clausing and his response thereto raise the same issues that are addressed in the Amended Answer filed by defendant Woodcreek.

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, ... the leave sought should, as the rules require, be "freely given."
>
> *Tagliani v. Colwell, supra* 10 Wn.App. at 233, 517 P.2d 207.

Walla v. Johnson, 50 Wn.App. 879, 883, 751 P.2d 334 (1998).

Defendant Woodcreek Homeowners Association had underlying facts that properly defeated plaintiff's claims in this case. There was no undue delay, bad faith or dilatory motive. As argued by plaintiff's summary judgment motion against defendant Woodcreek Homeowners Association, the original Answer filed by Woodcreek ostensibly established the impropriety of the Board's action in approving Mr.

Clausing's bonus room and the liability of Woodcreek to plaintiff. Woodcreek sought no more than to have the trial court evaluate its actions rather than to have liability conceded by the Answer originally filed on its behalf.

Woodcreek respectfully requests this Court affirm the trial court's decision to grant Woodcreek leave to amend its Answer.

5. Woodcreek Homeowners Association takes no Position on the Propriety of the Fee Award in Favor of Clausing.

Plaintiff's third assignment of error challenges the trial court's award of attorneys' fees and costs to defendant Clausing as a prevailing party following the grant of summary judgment and dismissal in his favor. The Washington Condominium Act provides for such an award, RCW 64.34.455, and that provision of the Condominium Act is applicable to this case even though Woodcreek was created under the Horizontal Property Regimes Act. RCW 64.34.010. As this assignment of error is not applicable to defendant Woodcreek Homeowners Association, it takes no position regarding the propriety of the trial court's award of attorneys' fees and costs to defendant Clausing as against plaintiff Lake.

CONCLUSION

While there may be some facial appeal to plaintiff's argument that increasing the square footage of any unit at Woodcreek will alter its value

and corresponding percentage of ownership, that argument finds no support in the statutes, case law or in the Woodcreek source documents. In places throughout Woodcreek, there are units of similar types that have different values and different percentages of undivided ownership that are unrelated to either square footage or the presence or absence of a bonus room. There is no formula or prescription in the Woodcreek source documents to suggest the addition of a bonus room requires any amendment of the value of the property, the value of all of the units, and the percentage of undivided ownership. Indeed, the source documents provide that the only time a revaluation and reapportionment is required is when a unit has been subdivided, which did not occur in this case.

Mr. Clausing sought and received Board approval per the Woodcreek By-Laws before constructing his bonus room. The action of the Board was subsequently ratified by more than 60% of the owners, well in excess of the 51% approval required by Section 12 of the Declaration for acts of combining units and common or limited common areas.

The trial court properly granted summary judgment and dismissal of plaintiff's claims and Complaint to the defendants. Plaintiff never requested more time to discover or procure evidence in opposition to defendants' motion for summary judgment, and, even before this Court, plaintiff merely argues that she should have been allowed discovery on the motion to amend

the Woodcreek pleadings, not in opposition to the defendants' motion for summary judgment.

The amendment of Woodcreek's Answer to reflect its actual legal position was a matter properly allowed by the trial court after applying the correct legal standard and balancing the facts of the case and any potential prejudice. This Court should not overturn the trial court's decision in the absence of manifest abuse of discretion, which is wholly absent in this case.

Woodcreek Homeowners Association respectfully requests the Court affirm the trial court's Orders granting leave to Woodcreek to amend it Answer and granting defendants' motion for summary judgment and dismissal.

RESPECTFULLY SUBMITTED this 15th day of June, 2007.

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By: _____
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NO. 59211-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SANDRA LAKE,

Appellant,

v.

WOODCREEK HOMEOWNERS ASSOCIATION, a Washington homeowners association; GLEN R. CLAUSING, a single man,

Respondents.

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

I hereby certify that I arranged to have copies of the Brief of Respondent Woodcreek Homeowners Association served on the following attorneys for plaintiff and respondent Clausing via U.S. Mail on June 15, 2007:

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SIGNED THIS 15th day of June, 2007 at Seattle, Washington.

GRACE KIMM